

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LANCE INTERNATIONAL LTD., d/b/a	:	
AMPAC PACKAGING SPECIALISTS	:	CIVIL ACTION
Plaintiff	:	
v.	:	No. 98-2229
	:	
MENOMINEE PAPER COMPANY	:	
Defendant.	:	

MEMORANDUM-ORDER

GREEN, S.J.

July , 1999

Presently before the court is Defendant Menominee's Motion for Summary Judgment and Plaintiff Ampac's Response thereto. For the following reasons, Menominee's Motion for Summary Judgment will be granted with respect to Ampac's claims for tortious interference with existing and potential contractual relations and denied with respect to Ampac's claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Menominee's Motion for Summary Judgment on its counterclaim will be granted.

I. FACTUAL BACKGROUND

Ampac is in the packaging business and is a supplier of packaging products. As of November 1996, Pepperidge Farm was purchasing U-Board, a packaging stiffener, from Menominee on a purchase order to purchase order basis, with the duration of each purchase order lasting six (6) months. The purchase order pending in November 1996 was due to expire on April 1, 1997.

Menominee, a manufacturer of U-Board, became Ampac's exclusive source of U-Board for sales to Pepperidge Farm. On May 14, 1994, Ampac and Menominee entered into an exclusive sales agreement whereby Ampac became Menominee's exclusive sales agent for all sales of materials manufactured by Menominee to Pepperidge Farm, including the U-board. As

consideration, Ampac agreed not to solicit or represent any other manufacturer, dealer or distributor of U-board for sale to Pepperidge Farm and agreed to represent Menominee exclusively during the term of the agreement. (Sales Agreement, ¶ 2.) Ampac agreed to perform all administrative duties of servicing Pepperidge Farm, including but not limited to order placement and scheduling, order follow up, price negotiations and sales calls. In addition, it was understood that, as needed, Menominee may be required to visit Pepperidge Farm locations. (Sales Agreement, ¶ 3.) The term of the Sales Agreement was for five years.¹

According to Priscilla A. Soracin, purchasing manager for Pepperidge Farm, as a result of a quality and customer service problem which occurred at the Pepperidge Farm plant in Willard, Ohio, she learned for the first time in December 1996 that Ampac was a broker, not the manufacturer, of the U-Board. (Soracin Aff., ¶¶ 4, 5; Soracin Dep. at 161-62.) Soracin initiated contact with Menominee by phoning Bob Pehowic, Menominee's senior sales representative, and asking him to meet with her to speak about his company and what he could offer Pepperidge Farm as a supplier. (Soracin Dep. at 165; Pehowic Dep. at 62-63.) Soracin informed Pehowic of her preference to deal directly with a manufacturer, rather than a broker, and of the upcoming April 1, 1997 expiration of Pepperidge Farm's purchase order with Ampac, and Pehowic gave Soracin preliminary pricing information. (Soracin Dep. at 165-66; Pehowic Dep. at 62-63.)

Thereafter, Soracin decided to stop making U-Board purchases from Ampac and to pursue the direct purchase of U-Board from Menominee or other U-Board manufacturers. (Soracin Aff., ¶ 6; Soracin Dep. at 168.) Soracin states that in March or April of 1997 she

¹ Ampac states in its brief that it assumes, for purposes of this motion, that the Sales Agreement was binding.

informed Dolly Lance, President of Ampac, of her decision to stop purchasing from Ampac.

(Soracin Aff., ¶ 7; Soracin Dep. at 169-70.) Soracin also informed Pehowic at Menominee of her decision and asked him to send in the pricing that he was going to offer Pepperidge Farm.

(Soracin Dep. at 169-170.)

After being notified by Pepperidge Farm that Pepperidge Farm's contract with Ampac ended, Menominee requested assurances from Ampac in a letter dated April 4, 1997 that Ampac could fulfill its obligation as a sales representative under the Sales Agreement. In the absence of such assurances, Menominee stated that it would deem the Sales Agreement repudiated and until it received assurances, it would negotiate the continued sale of U-board directly with Pepperidge Farm. (Letter of April 4, 1997, Def.'s Ex. H.) Menominee wrote Ampac on May 1, 1997 to confirm that, due to Pepperidge Farm's decision, Ampac would be unable to perform as broker/reseller under the Sales Agreement and, therefore, the Sales Agreement was terminated. (Letter of May 1, 1997, Def.'s Ex. J.) Pehowic sent a written price quotation to Soracin on May 2, 1997 and based the quote on the same pricing which Menominee had used in its sales to Ampac.² (Soracin Dep. at 175; Spurgeon Dep., Vol. I at 108-09, Vol. II at 39, 43-44, 51.)

Soracin stated in her deposition that after informing Dolly Lance of her decision not to purchase from Ampac, Lance called Soracin's secretary to extend the contract to use the U-board that Lance had in inventory. Soracin said that her secretary extended the contract, without her approval, but after speaking with Lance, they ultimately agreed that the contract would end June

² Because Ampac bought the U-board from Menominee and then marked up the price of the U-board when it sold the U-board to Pepperidge Farm, the price quote from Menominee to Pepperidge Farm was less than the marked-up price Ampac had been using in its sales to Pepperidge Farm.

30, 1997. (Soracin Dep. at 170-71.) During the transition period through June 1997, Menominee honored Ampac's orders for U-Board for Pepperidge Farm. Although Ampac received payment from Pepperidge Farm, Ampac failed to pay Menominee for certain goods. Lance acknowledged that Ampac has not paid for these goods, and these goods are the subject of Menominee's counterclaim. (Lance Dep. at 111-112.) The principal amount of the invoices for these goods is \$36,803.15.

Pepperidge Farm eventually chose Menominee as its primary supplier and issued a purchase order to Menominee, effective July 1997. (Soracin Aff., ¶ 10; Soracin Dep. at 175-76.) Soracin states that the decision to sever the relationship with Ampac was made "on my own initiative and was not the result of any improper conduct by Menominee Paper Company. This was a decision based upon my desire not to pay a mark-up over manufacturer pricing and my desire to obtain prompt, direct, efficient technical service to Pepperidge Farm's manufacturing facilities." (Soracin Aff., ¶ 10, Soracin Dep., pp. 175-177.)

Ampac does not dispute the testimony of Soracin, but argues that Menominee took advantage of the quality control problem at the Willard Plant "to deal directly with Pepperidge Farm and undercut Ampac." (Pl.'s Mem. in Opp. at p. 5.) Ampac cites the deposition testimony of Scott Spurgeon, vice president of sales of Menominee, who states that in August 1996 Menominee was not profitable and that John Bell, the CEO of Menominee's parent, had often stated that "[w]e cannot survive as a company reliant upon an outside concern, a broker, having charge of our destiny." (Spurgeon Dep., Vol. I, at 44, 105.) Ampac also argues that a bound document dated November 8, 1996 and titled "1997 Sales Plan" provides evidence of Menominee's plan to do away with brokers. "The Sales Plan" is a document which contains a

chapter devoted to the “Cost of Doing Business With the Brokers.” (See Pl.’s Supp. Mem. Ex. A.)

“The Sales Plan” reads that “Bob Pehowic will actively call on existing customers for account maintenance and will seek out new tube stock business.” It further states that “Bob Pehowic will direct our tube stock sales efforts and will be responsible for coordinating day-to-day technical support through the paper mill resources.” (See Ex. A at 17.) Ampac argues that Pehowic took advantage of the problem at the Willard Plant to meet with Soracin at the Willard plant. Ampac references a letter written by Pehowic to Soracin after they had met at the Willard plant. Pehowic states in the letter that “[i]t was a pleasure talking with you about a direct relationship with Menominee Paper Company, Inc.” Pehowic further stated in the letter that Menominee felt that it could give her “better quality control service along with a good cost savings” and that “we feel we are better prepared to work with you instead of a broker.”³ (Letter dated January 31, 1997, Pl.’s Ex. E.)

Menominee seeks summary judgment on all of Ampac’s claims, which include claims

³ In Plaintiff’s Supplemental Memorandum filed May 17, 1999, Plaintiff states that a file titled “Target, Inc.” or “Target Corporation” and copies of several form letters dated September and October 1996 were unearthed at Menominee’s plant in Conyers, Georgia. Allegedly, the Target file was in a black file cabinet among at least 50 other similar files, all of which had yellow labels. Plaintiff alleges that all of the files in this file cabinet were organized the same way and contained a form letter in which Mr. Spurgeon introduced himself to business prospects. The label on the “Target” file contained the address “595 Connecticut Avenue, Norwalk, Connecticut.” The “Target” file was empty. The address of Pepperidge Farm is 595 Westport, Norwalk, Connecticut. Ampac argues that in that file would have been a letter in which Mr. Spurgeon introduced himself to Pepperidge Farm. However, Ampac has not produced any evidence of the files, the form letters, the “Target” file or any evidence to substantiate its conclusory allegation that such “Target” file contained a letter to Pepperidge Farm. As Ampac has failed to come forward with any evidence to support its allegations concerning these files, the court will not consider Ampac’s arguments related to the files.

for (1) tortious interference with existing contractual relations; (2) tortious interference with prospective contractual relations; (3) breach of contract; and (4) breach of implied covenant of good faith and fair dealing. Menominee argues that each count is dependent upon the same contention: Ampac's contention that Menominee initiated contact with Pepperidge Farm to induce Pepperidge Farm to stop purchasing from Ampac and that Menominee's subsequent direct sales of U-Board to Pepperidge Farm constitutes a breach of the May 14, 1994 Sales Agreement.

Menominee argues that Ampac has failed to substantiate this contention with any evidence.

Menominee argues that it properly sought adequate assurances and, subsequently, terminated the Sales Agreement under U.C.C. § 2-609. Finally, Menominee argues that its conduct was justified based on its legitimate interest not to lose the Pepperidge Farm business to a competitor.

II. DISCUSSION

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the nonmoving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case,

based on the affidavits or by the depositions and admissions on file. Id.; see also Fed. R. Civ. P. 56(e). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

A. Tortious Interference with Existing and Prospective Contractual Relations

To establish a cause of action for tortious interference, the plaintiff must prove (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct. Triffin v. Janssen, 626 A.2d 571, 574 (Pa. Super. 1993). In accordance with § 766 of the Restatement of Torts, in determining whether the defendant's conduct in intentionally interfering with an existing contract or prospective contractual relation is improper or not, the court should consider the following factors: (a) the nature of the defendant's conduct, (b) the defendant's motive, (c) the interests of the other party with which the defendant's conduct interferes, (d) the interests sought to be advanced by the defendant, (e) the proximity or remoteness of the defendant's conduct to the interference, and (f) the relations between the parties. Id.

With respect to Ampac's claims for tortious interference with existing contractual relations, Ampac has failed to produce any evidence that a contract existed between Ampac and Pepperidge Farm under which either Pepperidge Farm or Ampac refused to or was prevented from performing as a result of some conduct on the part of Menominee. Ampac and Pepperidge Farm were doing business on a purchase order to purchase order basis, and all purchase orders made by Pepperidge Farm were filled by Ampac and paid for by Pepperidge Farm. Although the final contract between Ampac and Pepperidge Farm was not the usual six-month contract, both

parties mutually agreed to end the contract on June 30, 1997, and there is no evidence that Menominee intentionally interfered with either party's decision to shorten the contract. Furthermore, Menominee honored all of Ampac's orders for U-Board for Pepperidge Farm as long as Pepperidge Farm was willing to continue purchasing from Ampac. Thus, no existing contractual relationship was present between Ampac and Pepperidge Farm with which Menominee could have interfered.

With regard to Ampac's claim for tortious interference with prospective contractual relations, Ampac must prove that, but for Menominee's wrongful actions, it is reasonably probable that Ampac would have entered into a particular future contractual relationship with Pepperidge Farm. See Glenn v. Point Park College, 272 A.2d 895, 898-99 (Pa. 1971). In the present case, the evidence presented by Menominee demonstrates that Priscilla Soracin of Pepperidge Farm decided on her own initiative to stop making U-Board purchases from Ampac and to pursue the direct purchase of U-Board from Menominee or other U-Board manufacturers. Because Soracin had decided to seek other suppliers for the U-Board even before contacting Menominee to discuss a direct relationship, prospective contractual relations between Ampac and Pepperidge Farm were speculative. Ampac has failed to offer any evidence to rebut Menominee's evidence that Soracin did not intend to continue doing business with Ampac. Thus, Ampac has not shown that it was reasonably probable that Ampac would have continued to do business with Pepperidge Farm.

Ampac has also failed to offer evidence to demonstrate that any conduct on the part of Menominee contributed to Soracin's decision to seek other suppliers. The mere fact that Menominee had an interest in eliminating brokers is not enough to create a genuine issue of fact

that Menominee interfered with any relationship between Ampac and Pepperidge Farm.

Likewise, the fact that Bob Pehowic had conversations with Soracin about a direct relationship when he visited the Pepperidge Farm plant does not provide evidence of tortious interference with contractual relations where the evidence is undisputed that Soracin initiated those conversations.

Additionally, Ampac has failed to produce any evidence that Menominee's actions under the circumstances were not justified. The Third Circuit has found that where an actor is motivated by a genuine desire to protect legitimate business interests, this factor weighs heavily against finding an improper interference. See Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 665-67 (3d Cir. 1993). In this case, Menominee was approached by Pepperidge Farm, and Pepperidge Farm shared with Menominee its desire to enter into a relationship with a manufacturer, rather than a broker. Knowing that Pepperidge Farm no longer wanted to purchase from Ampac, Menominee was faced with the possibility of losing Pepperidge Farm's business altogether. Therefore, Menominee had a legitimate interest in retaining its business with Pepperidge Farm when it engaged in preliminary discussions with Pepperidge Farm about a potential direct relationship. Under the circumstances of this case, especially Menominee's knowledge of Pepperidge Farm's intention to sever its relationship with Ampac, and absent any evidence to dispute the fact that Pepperidge Farm decided to sever its relationship with Ampac on its own, this court concludes that Menominee's conduct was justified in the context of a claim for tortious interference with contractual relations.

B. Breach of Contract

The Sales Agreement between Ampac and Menominee provided that Ampac would

represent Menominee exclusively as a “Sales Agent” for the sale of all materials manufactured by Menominee to Pepperidge Farm, Inc. Since both parties agreed that Ampac would be acting as the sales agent for the sale of all materials manufactured by Menominee to Pepperidge Farm, the Sales Agreement necessarily implies that Menominee agreed not to sell materials to Pepperidge Farm through any other entity, including itself. The Court will only imply terms which must necessarily have been in the contemplation of the parties in making the contract. McGuire v. Shubert, 722 A.2d 1087, 1090 (Pa. Super. 1998). The court concludes that this implied term was in the contemplation of the parties in making the agreement because such a construction of the agreement comports with the parties actions as Menominee did, in fact, only sell the U-Board to Pepperidge Farm through Ampac, and before Menominee began selling U-Board directly to Pepperidge Farm, it found it necessary to attempt to repudiate the contract to open the door to the direct relationship with Pepperidge Farm. Furthermore, neither party advances any other contract interpretation in their briefs submitted to the court.

Menominee argues that there can be no breach of the agreement because it effectively repudiated the agreement under U.C.C. § 2-609 when it requested adequate assurances and none were received within 30 days of the request.⁴ Although Menominee did follow the requirements

⁴ Pursuant to U.C.C. § 2-609, codified at 13 Pa. Cons. Stat. Ann. § 2609,

(a) A contract for sale imposes an obligation on each party that the expectation of the other of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(b) Reasonableness and adequacy between merchants. Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

of the Uniform Commercial Code in seeking adequate assurances, Menominee does not address the question of why Ampac could not give Menominee the assurances it requested. Although Menominee may not have initiated the contact with Pepperidge Farm, Menominee willingly engaged in preliminary negotiations with Pepperidge Farm regarding a direct relationship while the Sales Agreement was in effect. Menominee also quoted Pepperidge Farm a better price than Ampac was offering, and Menominee represented that it could give better service and cost savings to Pepperidge Farm and that it was better prepared to work with Pepperidge Farm instead of a broker. After all of these events took place, Menominee requested adequate assurances that Ampac could perform under the contract. When Ampac could not give the requested assurances, Menominee attempted to repudiate the contract and very soon thereafter commenced a direct relationship with Pepperidge Farm. In the present situation, where the conduct of Menominee may have caused or contributed to Pepperidge Farm's ultimate decision to cease business relations with Ampac, and as a consequence, caused or contributed to Ampac's inability to perform under the Sales Agreement, a question of fact is presented as to whether the request for adequate assurances was proper and reasonable under the circumstances. If the finder of fact concludes that Menominee's request was not proper and the agreement was not effectively repudiated, Ampac's claim for breach of contract would still be viable. Therefore, as the breach of contract claim rests on a question of fact, Defendant's Motion for Summary Judgment on this claim will be denied.

(d) After receipt of a justified demand, failure to provide within a reasonable time not exceeding 30 days such assurances of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

C. Breach of the Duty of Good Faith and Fair Dealing

Section 205 of the Restatement (Second) of Contracts, which was adopted by the Pennsylvania Superior Court provides that "every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Kaplan v. Cablevision of Pa. Inc., 671 A.2d 716, (Pa. Super. 1996) (citing Restatement (Second) of Contracts, § 205). A similar obligation has been imposed upon contracts within the scope of the Uniform Commercial Code (UCC) by 13 Pa. Cons. Stat. Ann. § 1203. Id. "Good faith" is defined as "[h]onesty in fact in the conduct or transaction concerned." See id. (citing 13 Pa. Cons. Stat. Ann. § 1201). Although the breach of the obligation to act in good faith cannot be precisely defined in all circumstances, examples of "bad faith" conduct include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Id. (citing Somers v. Somers, 613 A.2d 1211, 1213 (1992)). In the present case, whether Menominee's actions in negotiating a direct relationship with Pepperidge Farm while bound by the Sales Agreement and ultimately entering into such relationship constitute "bad faith" is a question of fact. Therefore, Menominee's Motion for Summary Judgment on Ampac's claim for breach of the duty of good faith and fair dealing will be denied.

D. Menominee's Counterclaim

Menominee argues that it is entitled to the \$36,803.15 for goods sold to Pepperidge Farm from Ampac for which Ampac received payment from Pepperidge Farm. Ampac argues that it is excused from payment of the invoice because Menominee materially breached the Sales Agreement citing Oak Ridge Construction Co. v. Tolley, 504 A.2d 1343 (Pa. Super. 1985). In

Oak Ridge, the court held that if a party materially breaches the contract, the non-breaching party is discharged from all liability under the contract. See id. at 1348. The court concluded, however, that the party that breached the contract was still entitled to restitution for any benefit conferred upon the non-breaching party in excess of the loss caused by its breach. See id. Similarly, in the present case, Menominee is entitled to payment for the goods in excess of any loss caused by its alleged breach. The court will grant Menominee's motion for summary judgment on its counterclaim at this time as to liability, and Menominee will be entitled to damages in the amount of \$36,803.15 less any damages found at the time of trial to be the result of Menominee's alleged breach of the Sales Agreement.

III. CONCLUSION

As Ampac has failed to produce sufficient evidence to create a genuine issue of material fact that Menominee interfered with an existing or prospective relationship between Ampac and Pepperidge Farm and as this court has concluded that Menominee had a legitimate business interest in retaining Pepperidge Farm's business, Menominee's Motion for Summary Judgment on Ampac's claims for tortious interference with existing and prospective contractual relations will be granted. Menominee's Motion for Summary Judgment on Ampac's claim for breach of contract will be denied as Menominee's attempt to repudiate the Sales Agreement under U.C.C. § 2-609 may not have been proper under the circumstances and, therefore, ineffective. Finally, Menominee's Motion for Summary Judgment on Ampac's claim for breach of the duty of good faith and fair dealing will be denied as a question of fact exists as to whether Menominee acted in bad faith. Finally, Menominee's Motion for Summary Judgment on its counterclaim for unpaid invoices will be granted.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LANCE INTERNATIONAL LTD., d/b/a	:	
AMPAC PACKAGING SPECIALISTS	:	CIVIL ACTION
Plaintiff	:	
v.	:	No. 98-2229
	:	
MENOMINEE PAPER COMPANY	:	
Defendant.	:	

ORDER

AND NOW, this 9th day of July 1999, upon consideration of Defendant Menominee's Motion for Summary Judgment and Plaintiff Ampac's Response thereto, IT IS HEREBY ORDERED that:

1. Menominee's Motion for Summary Judgment on Ampac's claim for intentional interference with existing contractual relations is GRANTED, and judgment will be entered when all claims in this matter have been adjudicated;

2. Menominee's Motion for Summary Judgment on Ampac's claim for intentional interference with prospective contractual relations is GRANTED, and judgment will be entered when all claims in this matter have been adjudicated;

3. Menominee's Motion for Summary Judgment on Ampac's claim for breach of contract is DENIED;

4. Menominee's Motion for Summary Judgment on Ampac's claim for breach of the implied covenant of good faith and fair dealing is DENIED; and

5. Menominee's Motion for Summary Judgment on its counterclaim for unpaid invoices is GRANTED and Menominee will be entitled to damages in the amount of \$36,803.15 less any damages found at the time of trial to be the result of Menominee's alleged breach of the Sales Agreement.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.